IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 26TH NOVEMBER 2007 / 5TH AGRAHAYANA 1929

MFA.No. 271 of 2003()

OPMV.1601/1995 of ADDL.MOTOR ACCIDENT CLAIMS TRIBUNAL, ERNAKULAM
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APPELLANT: 3RD RESPONDENT

THE NEW INDIA ASSURANCE CO.LTD.,
REP. BY ITS ASST.ADMINISTRATIVE OFFICER,
REGIONAL OFFICE, KANDOMKULATHY TOWERS,
M.G.ROAD, ERNAKULAM.

BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL

RESPONDENTS: CLAIMANTS & RESPONDENTS 1 & 2
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1. ULLAS, S/O.RAMANKUTTY,
THANIKKAPILLY HOUSE, PONNURUNNI,
VYTTILA, COCHIN - 19.

2. DEEPA, W/O.ULLAS,
THANIKKAPPILLY HOUSE, PONNURUNNI,
VYTTILA, COCHIN - 19.

* 3. T.A.NAZAR, KAMBIYIL BABU MANZIL,
AVALOOKUNNU, WARD, ALAPPUZHA.

(THE NAME OF THE 3RD RESPONDENT IS DELETED FROM PARTY ARRAY AT THE RISK OF THE APPELLANT VIDE ORDER DATED 6.7.2007 IN I.A.NO.1393/2007)

4. PRASANNA, S/O.PADMANABHAN,
MADAMBUKUNNEL HOUSE, NEAR THARAMOOD
JUNCTION, KAYUNAKL DESOM, MANNAMCHERRY
VILLAGE, ALAPPUZHA DISTRICT.

BY ADV. SRI.ANIL S.RAJ
SMT.K.N.RAJANI
SMT.MANJUSHA MOHANDAS

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 26/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

M.F.A.No.271 of 2003

Dated this the 26th November, 2007.

J U D G M E N T

The 3rd respondent, Insurer, in O.P.(M.V.) No.1601/1995, on the file of the Motor Accidents Claims Tribunal, Ernakulam, is the appellant. Respondents 1 and 2 were travelling in an auto rickshaw bearing Registration No.KDE.6672, along the Aroor-Vyttila Bye-pass road, from south to north, at about 11.45 pm. on 29.6.1994. When it reached the place of accident, a mini lorry bearing Registration No.KL-04/A 5009 came from the opposite direction. A collision took place between the two vehicles. The second respondent sustained injuries. She filed O.P.(M.V.) No.1602/1995 claiming compensation for the injury sustained by her in the accident. In addition to that, she filed O.P.(M.V.) No.1601/1995 alleging that she was pregnant by five months at the time of the accident, and after the accident, the UltraSonography showed that there was intra-uterine death of the baby. Hence, the pregnancy was medically terminated. It was averred that the child under the womb is a person in the eye of law and respondents 1 and 2 are entitled to get a compensation of Rupees Two Lakhs on account of death of foetus in the womb. It was

averred that the accident occurred due to the negligence of the owner of the mini lorry. The owner and driver of the mini lorry filed a written statement contending that the accident occurred due to the negligence of the driver of the auto rickshaw. The appellant filed a written statement admitting the policy, but contended that in view of the claim petition filed the second respondent as O.P.(M.V.) No.1602/1995, this Original Petition (O.P.(M.V.) No.1601/1995) is not maintainable. The Tribunal found that the accident occurred due to the negligence of the driver of the mini lorry. The Tribunal also took a view that a pregnant lady who had to undergo termination of pregnancy on account of the accident is entitled to get compensation. The Tribunal further relying on the principle laid down in **Oriental Insurance Co. v. C.Nirmala and others**, found that the mother of an unborn child is entitled to get compensation, and hence, the Insurer was directed to pay the amount of compensation. Challenging that award, this appeal is filed.

2. The learned counsel appearing for the appellant has argued that the 2nd respondent had filed O.P.(M.V.) No.1602/1995 claiming compensation for the injuries sustained by her, and in fact, the Tribunal awarded compensation, taking into account of this fact

that there is medical termination of pregnancy also. It is argued that second respondent is not entitled to maintain a separate claim again, on the ground the unborn child is a person, and hence, the Original Petition is not maintainable. The fact that the second respondent filed O.P.(M.V.) 1602/1995 is not disputed. The learned counsel appearing for the appellant has made available a copy of the award passed in O.P.(M.V.) 1602/1995, which shows that the compensation due to the second respondent was fixed, taking into account of the fact that she was pregnant at the time of accident, and the foetus in the womb died, as a result of the injuries. The Tribunal awarded a compensation of Rs.1,61,000/= to her. In Oriental Insurance Co. v. C.Nirmala and others, the question arose as to whether the compensation is payable on account of the miscarriage of the foetus. In that case, the Tribunal found that the petitioner was entitled to claim compensation. But the question is whether a person who claimed compensation on account of the miscarriage can again maintain separate petition alleging death of the unborn child was not raised or considered.

3. **In Oriental Insurance Co. v. Rasheed** (2004 (3) KLT 552), the claimant died in a motor accident at the time when she was in advanced stage of pregnancy. A Division Bench of this Court held that no separate compensation is payable for the loss of foetus. But it should be taken as a bodily injury sustained by her in fixing the compensation.

4. In the case at hand, the second respondent filed a separate petition claiming compensation, in which the Tribunal awarded compensation taking into consideration of the fact of loss of foetus. Hence, the first respondent is not entitled to maintain a separate claim again on the very same issue. If she was dissatisfied with the quantum of compensation, she ought to have challenged that in accordance with law. The contention of the Insurer that one and the same person is not entitled to file two petitions, for one the injury sustained to her, and another on account of the death of the foetus is only to be accepted. So, the Original Petition is not maintainable and the same is only to be dismissed.

In the result, appeal is allowed. The award passed by the Tribunal in the Original Petition, O.P.(M.V.) No.1601/1995, is set aside. The Original Petition is dismissed. The amount, if any, deposited by the Insurer, appellant, shall be refunded to it.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

M.F.A.No.271 of 2003

J U D G M E N T

Dated:26th November, 2007.